

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

In re WINDSPIRE ENERGY, INC.,

Debtor.

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS,

Plaintiff,

vs.

GIACOMO MARINI et al.,

Defendants.

3:13-cv-00010-RCJ-WGC

**AMENDED
ORDER**

This adversary proceeding arises out of alleged fraudulent transfers and breaches of fiduciary duties by directors, officers, and shareholders of Debtor Windspire Energy, Inc., (“Windspire”). Two Defendants have separately moved to dismiss for failure to state a claim. Plaintiff has also filed a motion for partial offensive summary judgment against several Defendants. Also pending before the Court are a motion to join the Trustee as a party and a motion for leave to amend an answer to plead a counterclaim against the Trustee. For the reasons given herein, the Court denies all pending motions.

I. FACTS AND PROCEDURAL HISTORY

Windspire was formed as Mariah Power, Inc., a Nevada corporation, in 2005, to develop and market a wind turbine known as the “Windspire.” (Compl. ¶ 26, Jan. 10, 2013). Mariah Power, Inc. merged into a Delaware corporation of the same name in 2008 and adopted its

1 current name in March 2010. (*Id.* ¶ 27).

2 **A. The Mastech Agreement**

3 On November 10, 2008, CEO and Director Mike Hess signed an agreement (the
4 “Mastech Agreement”) with a Michigan company formed to manufacture the Windspire,
5 Mastech Windspire, LLC (“Mastech”), under which Debtor agreed to pay Mastech 115% of the
6 costs of production. (*Id.* ¶ 30). Because the Mastech Agreement guaranteed Mastech a profit no
7 matter its efficiency, the poorly negotiated contract resulted in the depletion of Debtor’s cash on
8 hand from over \$4.2 million in December 2008 to \$0 by October 2009, at which point operating
9 expenses were 160% of sales revenue and the Board of Directors knew that at least \$2 million to
10 \$5 million in additional capital would be required to continue operations. (*Id.* ¶¶ 30–34). As a
11 result of the alleged breach of fiduciary duty in entering into the Mastech Agreement, Debtor
12 accumulated \$1.5 million in mostly unsecured debt, the company was not able to attract further
13 investment, manufacturing ceased from December 2009 until at least March 2010, and Debtor
14 was required to enter into a settlement agreement with Mastech in March 2010 resulting in a \$1.3
15 million benefit to Mastech in cash and other agreements in exchange for Mastech to continue
16 manufacturing operations. (*See id.* ¶ 35). The board finally recognized in August 2010 that the
17 Windspire was not profitable, and Debtor continued to lose money through at least October 2011.
18 (*Id.* ¶ 36).

19 **B. The 2009 Loan**

20 The Board of Directors knew by June 2009 that at least \$2 million to \$5 million in
21 additional capital would be required to continue operations. (*Id.* ¶ 39). However, the Board
22 refused to consider financing above \$3 million, because the directors wished to maintain their
23 equity stake and indirect control of Debtor. (*Id.* ¶ 40). The Director Defendants and the
24 Shareholder Defendants (which Director Defendants controlled) held approximately 60% of
25 Debtor’s stock. (*See id.*). In September 2009, Noventi Ventures II, LP proposed a \$2 million

1 “bridge loan” (the “2009 Loan”) to be funded by the Shareholder Defendants and secured by
2 Debtor’s assets. (*Id.* ¶ 42). The Board approved the loan despite the availability of financing
3 with better terms, and the shareholders approved the loan (which required shareholder approval
4 because it amended the corporate charter) only because of false and misleading information given
5 by members of the Board to the shareholders. (*See id.* ¶¶ 43–50). The 2009 Loan saddled Debtor
6 with approximately \$1 million in debt at a time when it was insolvent, with over 75% of the debt
7 held by controlling insiders, i.e., the Shareholder Defendants. (*Id.* ¶ 51). Debtor never became
8 profitable, and there is currently approximately \$4.5 million in unsecured claims. (*Id.*). The
9 Committee alleges that the Shareholder Defendants breached their fiduciary duty to Debtor with
10 the intent of obtaining Debtor’s assets for their own benefit. (*Id.* ¶ 52).

11 **C. Expansion of Shareholder Defendants’ Control**

12 In late March 2010, Noventi Ventures II, LP proposed dilutive Series C equity funding to
13 the insolvent Debtor, to be offered only to existing shareholders. (*Id.* ¶ 54). The terms of the
14 offer indicated that either Debtor or a majority of the secured debt holders, could convert the
15 2009 Loan to equity if Debtor could not repay the loan by June 2010. (*Id.* ¶ 55). With this
16 presented to them by the Board as “the only option,” the shareholders approved the plan. (*Id.*
17 ¶¶ 55–56). Thereafter, Noventi Ventures II, LP demanded a change to the terms, so that Debtor
18 would not have the right to convert the 2009 Loan to equity, and the Directors, four out of five of
19 whom held interests in the 2009 Loan, agreed to the amendment without presenting it to the
20 shareholders, breaching their fiduciary duty to Debtor. (*Id.* ¶ 56). Following this agreement,
21 Shareholder Defendants held 64–74% of Debtor’s stock, with Noventi Ventures II, LP itself
22 holding 42–52%. (*Id.* ¶ 58). By the end of 2010, Debtor remained insolvent and owed over \$3.3
23 million in secured debt, with about 91% owed to Shareholder Defendants, and about 69% owed
24 to Noventi Ventures II, LP. (*Id.* ¶ 60). Director Defendants and Shareholder Defendants had
25 ensured that Shareholder Defendants would be the only entities to receive an appreciable amount

1 in liquidation. (*Id.*). Communications between the Director Defendants in fact show that they
2 compared the secured debt to “preferred stock” and that the only difference in calling it “debt”
3 was that the Shareholder Defendants would take before creditors in liquidation. (*Id.*).

4 **D. Noventi’s Control**

5 In July 2010, non-party CEO Walt Borland hired Robert Mosebar as a “Manufacturing
6 Consultant” and “Director of Manufacturing” for \$120,000 per year. (*Id.* ¶ 61). The Committee
7 alleges that the position was unnecessary, that Mosebar provided no valuable services to Debtor,
8 and that he was simply hired as a “mole” for Noventi Ventures II, LP to assist it in understanding
9 and controlling the manufacturing process and to aid its breaches of fiduciary duty. (*Id.*). In
10 violation of a 2008 voting agreement providing that the common shareholders would elect the
11 CEO, the Board in October 2010 appointed Noventi Ventures II, LP principal James Horn as
12 CEO. (*Id.* ¶ 62). The Board passed a resolution whereby Noventi Ventures II, LP or Noventi,
13 LLC would pay Horn directly, and then Debtor would reimburse the Noventi entity at \$15,000
14 per month.¹ The Committee alleges that the appointment of Horn was a breach of fiduciary duty
15 because he was unqualified, and because of the conflict Horn had with Noventi. (*See id.* ¶ 63).
16 Also, Borland had presented the first viable plan to make Debtor profitable by terminating
17 Mastech and retaining a high-quality Nevada manufacturer, *inter alia*. (*Id.* ¶ 64). The Board
18 therefore violated its duties of loyalty and care by failing to take advantage of a solution to the
19 manufacturing problem. (*See id.* ¶¶ 65–66).

20 **E. The 2011 Financing**

21 In April 2011, the Shareholder Defendants, knowing that Noventi Ventures II, LP would
22 be the primary lender for new loans, proposed amendment to the 2009 Loan to state that all notes
23 issued after April 1, 2011 would be senior to all prior notes, and the Board and CEO Horn

24
25 ¹That agreement is the basis for Noventi, LLC’s unsecured claim in the bankruptcy case.
(*Id.*).

1 accepted the proposal. (*Id.* ¶ 70). The Board also approved Secured Promissory Note No. 41,
2 which purported to convert over \$1.2 million in unsecured debt to Noventi Ventures II, LP to
3 senior secured debt, for no consideration. (*Id.* ¶ 71). These acts, at a time when Debtor was
4 insolvent, were breaches of Defendants fiduciary duties, because they made Noventi Ventures II,
5 LP the sole creditor to recover in any liquidation. (*Id.* ¶ 72). No new investors were sought as an
6 alternative. (*Id.* ¶ 73). During this time, Noventi Ventures II, LP effectively controlled Debtor,
7 treating it as a subsidiary. (*Id.* ¶¶ 74–75). For example, Noventi Ventures II, LP rejected a
8 proposed merger by a Japanese company, Zephyr, after it engaged in direct negotiations with
9 Zephyr, and without informing the Board of the proposal. (*Id.* ¶ 75).

10 **F. The Attempted “Asset Grab”**

11 Noventi Ventures II, LP usurped Debtor’s corporate opportunities by placing an intern at
12 Windspire, Marco DiFulvio, to copy confidential information and transport it back with him to
13 Italy, where DiFulvi’s associated company, Innova, was to engage in other wind-power-related
14 joint ventures with Noventi Ventures II, LP and other Italian companies. (*Id.* ¶¶ 76–78). Noventi
15 Ventures, LP contemplated three different transactions in furtherance of the plan to obtain
16 Debtor’s assets and leave creditors with nothing. Under option 1, Noventi Ventures, LP would
17 sell its senior secured debt to Linear Capital Partners, who would then foreclose on Debtor’s
18 assets and put them into a new public shell company, in which Noventi Ventures, LP would
19 receive a 20% interest, and Horn would be made the CEO. (*Id.* ¶ 79). Under option 2, Debtor
20 would file for bankruptcy, in which its assets would be sold free and clear in a § 363 sale,
21 Noventi Ventures II, LP would receive 19% of the stock of a new public company, unsecured
22 creditors would receive 1%, and Horn would be made CEO. (*Id.*). Option 2 would reach the
23 same result as Option 1, except that unsecured creditors would receive token amounts, and any
24 potential lingering liabilities would be extinguished. (*Id.*). The present Chapter 11 case
25 represents option 2. (*Id.*). Under option 3, Debtors assets would be sold in exchange for an 8%

1 equity interest in an undercapitalized company, with 90% of the consideration going to Noventi
2 Ventures II, LP and 5% going to unsecured creditors. (*Id.*). The agreement would give Noventi
3 Ventures II, LP broad voting powers and releases from liability. (*Id.*). All three options would
4 have the same substantive result: a new entity would receive Debtor's assets, Noventi Ventures
5 II, LP would receive a substantial stake in the transferred equity, and Debtor's liabilities would
6 be avoided. (*Id.* ¶ 80). Horn called Debtor's bankruptcy counsel on January 20, 2012 and asked,
7 "[I]f the asset acquisition . . . won't happen . . . how [can] Noventi . . . acquire the assets of the
8 company?" (*Id.* ¶ 81). On May 14, 2012, the Bankruptcy Court ordered a Chapter 11 Trustee to
9 be appointed, who later determined it was in the best interests of the estate to move forward with
10 a § 363 sale to the cash bidder, Ark Alloy, LLC, or any higher bidder. (*Id.* ¶ 82). Ark Alloy
11 bought the assets for \$100,000. (*Id.*).

12 **G. Bankruptcy-Related Misconduct**

13 Although the pre-petition financial reports indicate that Debtor may have been viable
14 minus its improperly acquired debt, Horn sought bankruptcy for the improper purpose of
15 obtaining control of Debtors's assets for Shareholder Defendants, while shedding the liabilities.
16 (*Id.* ¶¶ 83–84). The Board has breached its duty of loyalty by failing to explore a true
17 restructuring. (*Id.* ¶ 84). Peter Henig resigned rather than vote on whether to petition for
18 bankruptcy, but Horn, Giacomo Marini, and Ian Rogoff voted to do so despite their personal
19 interests, without obtaining the consent of the shareholders. (*Id.* ¶ 85). These directors eventually
20 resigned, but not before appointing Robert Mosebar as President and Director of the Debtor in
21 Possession. (*Id.* ¶ 87). Mosebar was again controlled by Noventi Ventures II, LP, and he was
22 serving as that company's representative on the Committee, as well. (*Id.* ¶ 88). He refused to
23 resign, despite the conflict of interests. (*Id.*). Mosebar violated his duties to Debtor by serving
24 Noventi Ventures II, LP's interests while appointed to serve Debtor. (*Id.* ¶ 89). The Committee
25 accuses Mosebar of making false statements to the Bankruptcy Court in several contexts. (*See*

1 *id.*).

2 **H. Conversion of Estate Assets and Spoilation of Evidence**

3 When Ark Alloy attempted to collect Debtor's assets, it found that the primary and
4 backup hard drives of Debtor's server had been either wiped clean or replaced with blank drives.
5 (*Id.* ¶ 91). Mosebar has admitted shutting down Debtor's servers on May 14, 2012, having been
6 at the headquarters again on July 27, 2012, and that only he, the Trustee, and the landlord had
7 access to the property. (*Id.* ¶ 92). When Mosebar produced for Ark Alloy what he claimed to be
8 a full copy of Debtor's hard drives, Debtor's former chief operating engineer reviewed it and
9 found that a substantial amount of engineering data was missing, without which Ark Alloy would
10 not be able to produce Windspire's product. (*Id.* ¶ 93). A substantial amount of dealer
11 information was also missing. (*Id.* ¶ 94).

12 **I. The Present Case**

13 The Committee brought an adversary proceeding in the Bankruptcy Court for: (1)–(2)
14 breach of fiduciary duty; (3) aiding and abetting breach of fiduciary duty; (4) corporate waste;
15 and (5)–(17) various core bankruptcy claims. The Committee named fourteen Defendants, which
16 the Court will categorize into three groups: (1) Giacomo Marini, Ian Rogoff, Tim Rodgers, Hess,
17 Michael Schwab, Peter Henig, James Horn, and Robert Mosebar (collectively, "Director
18 Defendants"), (*see id.* ¶¶ 8–15)²; (2) Noventi Ventures II, LP ("Noventi"), Big Sky Venture
19 Capital III, LLC ("Big Sky III"), Big Sky Venture Capital IV, LLC ("Big Sky IV"), Greenhouse
20 Capital Partners, LP ("Greenhouse"), and Venmilo Partners, LLC ("Venmilo") (collectively,
21
22

23
24 ²Director Defendants are alleged to have been directors of Debtor at various times. (*See*
25 *id.*). Hess and Horn are also alleged to have been CEO of the Debtor at various times, (*see id.*
¶¶ 11, 14), and Mosebar is also alleged to have been a manufacturing consultant, Director of
Manufacturing, and President of Debtor at various times, (*see id.* ¶ 15).

1 “Shareholder Defendants”) (*see id.* ¶¶ 16–20)³; and (3) Noventi, LLC, (*see id.* ¶ 21).⁴

2 The Court granted two motions to withdraw the reference in part and a motion to
3 withdraw the reference in full. Big Sky III and Big Sky IV have moved to dismiss the second,
4 third, and fifth claims. Greenhouse has separately moved to dismiss the same claims. The
5 Committee has moved for offensive summary judgment as to the liability of the Director
6 Defendants and Noventi Ventures II, LP on the breach of fiduciary duty claims.

7 **II. LEGAL STANDARDS**

8 **A. Dismissal**

9 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
10 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
11 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
12 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
13 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
14 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
15 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
16 failure to state a claim, dismissal is appropriate only when the complaint does not give the
17 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
18 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
19 sufficient to state a claim, the court will take all material allegations as true and construe them in
20 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th

21
22 ³Shareholder Defendants are alleged to be both shareholders and putative unsecured
23 creditors of Debtor. (*See id.*). Horn is also alleged to have been a partner or of Noventi and/or a
24 managing member of Big Sky III and Big Sky IV. (*See id.* ¶ 16). Schwab is alleged to be the
25 managing member of Big Sky III and Big Sky IV. (*See id.* ¶ 18). Henig is alleged to be the
managing partner of Greenhouse. (*See id.* ¶ 19). Rogoff is alleged to have been the manager of
Venmilo. (*See id.* ¶ 20).

⁴Noventi, LLC is alleged to be a putative unsecured creditor of Debtor. (*See id.*).

1 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
2 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
3 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
4 with conclusory allegations is not sufficient; a plaintiff must plead facts pertaining to his own
5 case making a violation plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79
6 (2009) (citing *Twombly*, 550 U.S. at 556) (“A claim has facial plausibility when the plaintiff
7 pleads factual content that allows the court to draw the reasonable inference that the defendant is
8 liable for the misconduct alleged.”). In other words, under the modern interpretation of Rule
9 8(a), a plaintiff must not only specify a cognizable legal theory (*Conley* review), but also must
10 plead the facts of his own case so that the court can determine whether the plaintiff has any
11 plausible basis for relief under the legal theory he has specified, assuming the facts are as he
12 alleges (*Twombly-Iqbal* review).

13 “Generally, a district court may not consider any material beyond the pleadings in ruling
14 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
15 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
16 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
17 whose contents are alleged in a complaint and whose authenticity no party questions, but which
18 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
19 motion to dismiss” without converting the motion to dismiss into a motion for summary
20 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
21 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
22 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
23 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
24 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
25 2001).

1 **B. Summary Judgment**

2 A court must grant summary judgment when “the movant shows that there is no genuine
3 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
4 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*
5 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there
6 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A
7 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
8 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary
9 judgment, a court uses a burden-shifting scheme:

10 When the party moving for summary judgment would bear the burden of proof at
11 trial, it must come forward with evidence which would entitle it to a directed verdict
12 if the evidence went uncontroverted at trial. In such a case, the moving party has the
 initial burden of establishing the absence of a genuine issue of fact on each issue
 material to its case.

13 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations
14 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden
15 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by
16 presenting evidence to negate an essential element of the nonmoving party’s case; or (2) by
17 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
18 element essential to that party’s case on which that party will bear the burden of proof at trial. *See*
19 *Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary
20 judgment must be denied and the court need not consider the nonmoving party’s evidence. *See*
21 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

22 If the moving party meets its initial burden, the burden then shifts to the opposing party to
23 establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
24 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party
25 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the

1 claimed factual dispute be shown to require a jury or judge to resolve the parties' differing
2 versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
3 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment
4 by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d
5 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
6 allegations of the pleadings and set forth specific facts by producing competent evidence that
7 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

8 At the summary judgment stage, a court's function is not to weigh the evidence and
9 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
10 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are
11 to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely
12 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

13 **III. ANALYSIS**

14 **A. Motions to Dismiss**

15 **1. Breach of Fiduciary Duties**

16 Big Sky II and Big Sky III (collectively, "Big Sky") ask the Court to dismiss the second,
17 third and fifth claims against them for breach of fiduciary duty, aiding and abetting breach of
18 fiduciary duty, and equitable subordination under the Bankruptcy Code. Big Sky is only
19 mentioned by name in approximately four places in the Complaint: (1) Big Sky III is identified in
20 paragraph 17; (2) Big Sky IV is identified and Big Sky are alleged to be putative secured
21 creditors and shareholders of Debtor, with Schwab as their managing member, in paragraph 18;
22 (3) Big Sky is alleged to have been one of the investors that funded the merger of Mariah Power,
23 Inc. (NV) into Mariah Power, Inc. (DE) in paragraph 28; and (4) Big Sky is alleged in paragraph
24 40 to have controlled, in combination with other Shareholder Defendants, 60% of Debtor's stock
25 at the time of the 2009 Loan. However, Big Sky is included as two of the "VC Firms" in the

1 Complaint, which this Order refers to as Shareholder Defendants, and Shareholder Defendants’
2 alleged collective bad acts are noted throughout the complaint, as detailed, *supra*.

3 Big Sky argues that it was a minority shareholder that participated with other shareholders
4 in lending money to Debtor in the hope that Debtor would survive and become profitable. Big
5 Sky argues that the Complaint includes no allegations of wrongdoing by Big Sky. The Court
6 disagrees. The Complaint alleges in detail that, as controlling shareholders, Big Sky and other
7 Shareholder Defendants, had a duty not to engage in self-dealing, such as loaning money to the
8 corporation with terms more favorable to itself than to the corporation. The only potential
9 deficiency in the allegations is that Big Sky is clearly not alleged to have had a controlling
10 interest in Debtor. Generally, in Delaware—and the parties do not appear to dispute that
11 Delaware law controls here—“a shareholder owes a fiduciary duty only if it owns a majority
12 interest in or exercises control over the business affairs of the corporation.” *Ivanhoe Partners v.*
13 *Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). A minority shareholder may be a
14 controlling shareholder, and therefore owe the corporation a fiduciary duty, however:

15 [A] shareholder who owns less than 50% of a corporation’s outstanding
16 stocks does not, without more, become a controlling shareholder of that corporation,
17 with a concomitant fiduciary status. For a dominating relationship to exist in the
absence of controlling stock ownership, a plaintiff must allege domination by a
minority shareholder through actual control of corporation conduct.

18 *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (internal quotation
19 marks and citation omitted). Alternatively, as the Committee notes, in Delaware, controlling
20 shareholder status of a minority shareholder can be shown via a “control group” theory, whereby
21 more than one minority shareholders act in concert with one another such that the group as a
22 whole can exert de jure or, presumably, de facto control over the corporation sufficient to
23 implicate fiduciary duties:

24 Although a controlling shareholder is often a single entity or actor, Delaware case
25 law has recognized that a number of shareholders, each of whom individually cannot
exert control over the corporation (either through majority ownership or significant

1 voting power coupled with formidable managerial power), can collectively form a
2 control group where those shareholders are connected in some legally significant
3 way—e.g., by contract, common ownership, agreement, or other arrangement-to
4 work together toward a shared goal. In that case, the control group is accorded
5 controlling shareholder status, and, therefore, its members owe fiduciary duties to
6 their fellow shareholders. However, a “stockholder is entitled to vote its shares as
7 it chooses, including to further its own financial interest.” Accordingly, if all a
8 complaint alleges is that a group of shareholders have “parallel interests,” such
9 allegations are insufficient as a matter of law to support the inference that the
10 shareholders were part of a control group.

11 *Dubroff v. Wren Holdings, LLC*, No. 3940-VCN, 2009 WL 1478697, at *3 (Del Ch. May 22,
12 2009) (footnotes omitted). Although the opinion is unpublished, there are other unpublished
13 opinions holding the same, *see, e.g., Frank v. Elgamal*, No. 6120-VCN, 2012 WL 1096090, at *8
14 (Del. Ch. Mar. 30, 2012) (citing *id.*), none that the Court can find holding to the contrary, and the
15 argumentation therein is persuasive. The control group theory is based upon the same essential
16 reasoning as the “dominating relationship” theory. That is, neither a “dominating” minority
17 shareholder under *Citron*, nor a “control group” minority shareholder under *Dubroff* is a de jure
18 controlling shareholder, because neither directly controls over 50% of the corporation’s stock.
19 But the Court of Chancery has found it appropriate to impose upon a shareholder the same
20 fiduciary duties as are imposed upon a de jure controlling shareholder if the shareholder can
21 control the corporation in fact. It is the fact of control that matters. De jure (50%+) control
22 simply makes the question of control conclusive. Whether control comes via “domination” or
23 concerted action does not seem critical to the ultimate question of control. If anything, it is *more*
24 appropriate to view concerted action between shareholders holding a collective majority of shares
25 as de facto control than the acts of a “dominating” minority shareholder or shareholder group,
because the concept of “domination” inherently includes an element of subjective judgment,
whereas the facts of combined de jure ownership and collusion can both be objectively proved.

The remaining question is whether the Committee has sufficiently alleged that the
Shareholder Defendants had more than a mere common interest, but rather had an actual

1 agreement to act in concert. The Court believes this circumstance has been sufficiently alleged.
2 The Committee alleges that the 2009 Loan was given jointly by the Shareholder Defendants,
3 whose principals were other Director Defendants. The Committee sufficiently alleges collusion
4 between those Director Defendants as to the 2009 Loan, amendments thereto, and the Series C
5 equity funding. The Court therefore denies the motion to dismiss as against the second and third
6 claims. Whether Shareholder Defendants had control group status via concerted action or
7 violated their putative fiduciary duties applicable thereto with respect to the 2009 Loan,
8 amendments thereto, and Series C equity funding are questions of fact for a jury. For the same
9 reasons, the Court denies Greenhouse's separate motion to dismiss.

10 **2. Equitable Subordination/Disallowance**

11 The Committee brings a claim against Noventi Ventures II, LP, Big Sky, Greenhouse,
12 Venmilo, Rogoff, Mosebar, Hess, and Noventi, LLC for equitable subordination or equitable
13 disallowance of those Defendants' claims against the estate because these Defendants were all
14 insiders whose claims against the estate "arise from the allegedly secured or senior secured debt
15 that resulted from the breaches of duty and inequitable conduct described above" and which
16 would deprive the innocent unsecured creditors of any recovery if allowed.

17 [A]fter notice and a hearing, the court may—

18 (1) under principles of equitable subordination, subordinate for
19 purposes of distribution all or part of an allowed claim to all or part of
20 another allowed claim or all or part of an allowed interest to all or part of
21 another allowed interest; or

21 (2) order that any lien securing such a subordinated claim be
transferred to the estate.

22 11 U.S.C. § 510(c). The rule as it relates to insiders is summarized in the American Law
23 Reports:

24 In order to equitably subordinate the claim of a corporate insider, the courts
25 must find that the insider committed misconduct and used its control over a
financially troubled entity for personal gain and to the detriment of other debtors. If

1 insiders have misused their control, principles of fairness would be violated by
2 permitting the insiders to partake in distribution on an equal basis with other
creditors.

3 John J. Dvorske, *Bankruptcy: Equitable Subordination, Under 11 U.S.C.A. § 510(c), of Insider*
4 *Claims*, 2 A.L.R. Fed. 2d 119 (2005). The Court will not dismiss this claim, which has been
5 sufficiently pled to require an examination of the facts at summary judgment or by a jury.

6 **B. Motion for Summary Judgment**

7 The Committee asks the Court to grant it offensive summary judgment as to the liability
8 of Director Defendants and Noventi Ventures II, LP (“Noventi”) for breaches of fiduciary duty or
9 aiding and abetting such breaches, and against Marini, Rogoff, Horn, and Noventi for Corporate
10 Waste. It is clear that the Director Defendants owed a fiduciary duty. *See Arnold v. Soc’y for*
11 *Sav. Bancorp*, 678 A.2d 533, 539 (Del. 1996) (“Fiduciary duties are owed by the directors and
12 officers to the corporation and its stockholders.”). It is not factually clear whether Noventi owed
13 such a duty, although it is sufficiently alleged to have aided and abetted the Director Defendants’
14 alleged breaches.

15 The Court agrees with Defendants that the questions of breach of fiduciary duty and
16 waste are for a fact-finder in this case. Defendants catalogue the many factually disputed issues.
17 The Court will not recount in detail the several pages of disputed facts Defendants have
18 presented, which are supported by citations to declarations and transcripts in the record. There
19 are complex issues of disputed fact precluding summary judgment in this case. Attempting to
20 sort the issues out on motion practice would require the Court to weigh evidence, which it may
21 not do. The Court would for the same reason be strongly disinclined to grant defensive summary
22 judgment, as well, although Defendants have not so moved. Whether certain expenses or
23 business decisions were reasonable or breaches of the duties of loyalty or care are for the jury in
24 this case.

25 ///

1 **C. Motion for Joinder and Motion to Amend**

2 Noventi asks to join the Chapter 11 Trustee as a Plaintiff in the present case and
3 simultaneously asks the Court for leave to amend its answer to plead a counterclaim against the
4 Trustee, assuming the Court were to grant the motion for joinder. The Court denies the motions.
5 Movant misapprehends Rule 19. As movant notes, the Bankruptcy Court has approved a
6 stipulation permitting the Committee to pursue any claims the Trustee would normally pursue in
7 the present case such that the Trustee's presence here is unnecessary. The Trustee is not alleged
8 to claim any interest in the subject matter of the lawsuit herself, and the party she represents, the
9 Estate, is sufficiently represented here by the Committee. *See* Fed. R. Civ. P. 19(a)(1). Indeed,
10 the unsecured creditors have claims against the Estate and therefore have an even greater
11 motivation than the Trustee herself to adequately protect the assets of the Estate, and there is no
12 risk of inconsistent rulings or an inability of the Court to afford complete relief. *See id.*

13 The nature of the proposed counterclaim makes the purpose for the requested joinder
14 apparent. Movant seeks to add a counterclaim against the Trustee for declaratory judgment as to
15 core bankruptcy issues still being litigated in the bankruptcy court. If movant is unhappy with
16 the actions of the Trustee qua trustee or with the Bankruptcy Court's rulings, it may take up those
17 issues with the bankruptcy judge, and then on appeal under 28 U.S.C. § 158, but it may not
18 obtain from the district court what would in essence be an appellate ruling via a putative civil
19 claim for declaratory judgment in an adversary proceeding.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

CONCLUSION

IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 40, 52) are DENIED.

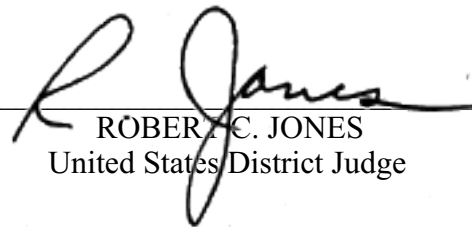
IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 105) is DENIED.

IT IS FURTHER ORDERED that the Motion for Joinder (ECF No. 170) is DENIED.

IT IS FURTHER ORDERED that the Motion to Amend (ECF No. 171) is DENIED.

IT IS SO ORDERED.

Dated this 21st day of February, 2014.



ROBERT C. JONES
United States District Judge